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What Constitutes Interrogation: Rhode Island v. Innis

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What constitutes interrogation?: *Rhode Island v. Innis*[1] — On May 26, 1974, a taxicab driver in Providence, Rhode Island was robbed by a passenger carrying a shotgun.[2] The driver identified his assailant from a photograph as Thomas Innis.[3] The Providence police subsequently mounted a search resulting in Innis's arrest.[4] Upon apprehension the arresting officer advised Innis of his rights as required by *Miranda v. Arizona*.[5] Minutes later, a police sergeant arrived at the arrest scene and gave Innis the *Miranda* warnings.[6] Almost immediately thereafter, Police Captain Leyden arrived and provided Innis with his third set of warnings.[7] Innis told the police that he understood these rights and wished to speak with a lawyer.[8]

Captain Leyden instructed three officers, Patrolmen Gleckman, McKenna and Williams, to escort the suspect to the central police station.[9] The policemen transported Innis in a four-door vehicle with a wire screen between the front and rear seats.[10] Shortly after the trip to the station got underway,[11] Officer Gleckman initiated a conversation with Officer McKenna in which he mentioned the presence of a school for handicapped children in the area.[12] Patrolmen Gleckman expressed deep concern that the youngsters at the school might discover a weapon with shells and that they might injure themselves with it.[13] According to Officer Williams, Gleckman displayed a particular worry that a little girl "would pick up the gun and maybe kill herself."[14] Innis then interrupted, asking the officers to turn back so that he could locate the weapon.[15]

Upon returning to the scene of the arrest, the respondent received a fourth set of *Miranda* warnings from Captain Leyden.[16] Innis informed the police that he clearly understood these rights, but indicated that he wished to find the weapon because of the danger to the local school children.[17] He then brought the police to the shotgun, which was located nearby.[18]

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[1] 446 U.S. 291 (1980).

[2] *Id.* at 293.

[3] *Id.*

[4] *Id.* at 293-94. The suspect was unarmed at the time of the arrest, and offered no resistance.

[5] 384 U.S. 436 (1966).

[6] 446 U.S. at 294.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* The trial court, faced with conflicting testimony, made no determination about the seating location of Officer Gleckman in the vehicle.

[11] Brief for Appellee at 6. The vehicle had, in fact, traveled only approximately a mile from the arrest scene before Innis asked the officers to return. *Id.* at 7.

[12] 446 U.S. at 294.

[13] *Id.* at 294-95.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

Two months after Innis's arrest a grand jury returned an indictment charging him with the kidnapping, robbery, and murder of another taxicab driver.[19] The defendant unsuccessfully moved to suppress as evidence the shotgun and his statements concerning the weapon.[20] The trial court found that the police had sufficiently advised Innis of his *Miranda* rights and that the officers in the police vehicle with him merely were voicing to each other an understandable concern for the children.[21] Accordingly, the court decided that Innis had made a clear and intelligent waiver of his *Miranda* rights.[22] The prosecution introduced the evidence in controversy at Innis's trial, and the jury returned a verdict of guilty on all counts.[23]

On appeal, the Rhode Island Supreme Court set aside Innis's conviction in a 5-2 decision.[24] The court found that the officers indeed had interrogated the defendant without obtaining a waiver of his right to counsel, thereby violating *Miranda* requirements.[25] The court reasoned that although the officers had not addressed the suspect directly, they had coerced him in such a way as to constitute an interrogation for *Miranda* purposes.[26] Having ruled that both the shotgun and related testimony were obtained unconstitutionally by the Providence police, the court granted Innis a new trial.[27]

The United States Supreme Court granted certiorari to consider for the first time the meaning of "interrogation" under *Miranda v. Arizona*.[28] In a 6-3 decision,[29] the Court vacated the state supreme court's decision and HELD: an interrogation occurs only when police officers employ words or actions that they *should have known* were reasonably likely to elicit an incriminating response.[30] Based on this definition of interrogation, the Supreme Court decided that Innis had not been interrogated, and thus that his constitutional rights had not been violated.[31]

Justice Stewart, writing for the majority, acknowledged that the protections articulated in *Miranda* apply not only to police interrogations that con-

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[19] *Id.* John Mulvaney, a Providence taxicab driver, had been murdered less than a week before Innis's arrest. Mulvaney had been killed by a shotgun blast to the back of the head. *Id.* at 293.

[20] *Id.* at 295-96.

[21] *Id.* at 296. The decision of the trial court is unreported.

[22] *Id.*

[23] *Id.*

[24] State v. Innis, __ R.I. __, 391 A.2d 1158 (1978).

[25] *Id.* at __, 391 A.2d at 1162.

[26] *Id.* at __, 391 A.2d at 1162-63.

[27] *Id.* at __, 391 A.2d at 1167.

[28] 440 U.S. 934 (1978).

[29] Justice Stewart's opinion was joined by Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist. 446 U.S. at 293-304. Justice White filed a separate concurring opinion, as did the Chief Justice. *Id.* at 304-05. Justices Brennan and Marshall dissented in an opinion written by Justice Marshall. *Id.* at 305-06. Justice Stevens dissented, but on different grounds. *Id.* at 307-17.

[30] *Id.* at 302.

[31] *Id.* at 302-04.

stitute express questioning of a suspect in custody,[32] but also to situations where a person in custody is subjected to the "functional equivalent" of express questioning.[33] The Court emphasized, however, that police should not be held responsible for unforeseeable results that may arise from their words or actions.[34] It reasoned that to hold law officers so accountable would do nothing to promote protection of a suspect's rights, and would make it difficult to employ normal police procedure. *Miranda* warnings, then, are required only when the policemen involved should know that their conduct is "reasonably likely"[35] to bring forth an incriminating response from the suspect.[36] Thus, the majority concluded that a finding of non-deliberate "subtle compulsion," as perceived by the suspect, is not by itself sufficient to constitute a "custodial interrogation" within the meaning of *Miranda*.[37]

In his dissenting opinion, Justice Marshall, joined by Justice Brennan, expressed basic agreement with the Court's definition of interrogation. He read this definition to encompass any situation in which police conduct is intended to obtain a response.[38] He stated, however, that the standard was applied incorrectly to the facts of the case.[39] Justice Marshall maintained that Officer Gleckman obviously was attempting to appeal to Innis's conscience and that the police were responsible for the "pressures to speak" brought to bear upon the suspect in this instance.[40] Therefore, he objected not to the general standard adopted by the *Innis* majority, but instead to the particular result reached in this case. Justice Stevens also filed a dissent,[41] which expressed basic philosophical differences with the majority's definition of interrogation which had not concerned Justice Marshall. The Stevens opinion proposed an alternative definition of interrogation[42] which was very much at variance with Justice Stewart's.

This majority standard indicated that, in assessing whether police officers had "interrogated" a suspect, police knowledge of that suspect's unique personal characteristics could be taken into account.[43] This concept makes the law enforcement officer's perception determinative.[44] Thus, the protection of a

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[32] *Id.* at 300-01.

[33] *Id.*

[34] *Id.* at 301-02.

[35] *Id.* at 302.

[36] *Id.*

[37] *Id.* at 303. The Court conceded that the policemen's remarks "struck a responsive cord [sic]" with the suspect, but ruled that this "is not the end of the inquiry." *Id.*

[38] *Id.* at 305.

[39] *Id.* at 305-07. Justice Marshall expressed the opinion that this decision was "simply an aberration" in the application of the Court's standard. *Id.* at 307.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 311.

[43] *Id.* at 302 n.8.

[44] *Id.* at 301-02. Although police intent is not the critical element in an interrogation under the Court's standard, its definition hinges on whether particular police officers can foresee the outcome of their behavior.

given suspect's constitutional rights is entrusted to the arresting policeman, who may very possibly be unaware of that suspect's particular weaknesses or susceptibilities. The *Innis* decision evinces a continuation of the Burger Court's extremely narrow interpretation of *Miranda*, and of the Court's unwillingness to view *Miranda* as establishing the primacy of the suspect's perspective in the custodial situation.

The purpose of this casenote is to demonstrate that the *Innis* Court's emphasis on police perceptions both undercuts traditional constitutional protections afforded to suspects, and may be extremely difficult for courts to apply. In addition, it will suggest an alternative approach in this area. Toward these ends, the casenote will first examine those sections of *Miranda* that deal with interrogation in order to show the intention of the *Miranda* Court in providing safeguards to the suspect. Next, it will examine the Burger Court's limitations on the *Miranda* holding, with particular emphasis on *Harris v. New York*[45] and *Michigan v. Tucker*.[46] The case of *Brewer v. Williams*[47] will be scrutinized in the context of this line of cases and *Rhode Island v. Innis*. The discussion will then turn to the Court's holding in *Innis* in light of the trend displayed in this series of post-*Miranda* decisions. Finally, the casenote will assess the practicality and potential difficulties in implementing the *Innis* majority's definition of interrogation and suggest a potentially more appropriate standard.

I. *MIRANDA*: RELIEF FOR THE ACCUSED

The Warren Court's holding in *Miranda v. Arizona*[48] signaled a dramatic recognition of the need for definite and effective measures designed to preserve an individual's fifth amendment privilege against self-incrimination. Certain decisions preceding *Miranda* had indicated an increased judicial regard for the rights of the accused.[49] *Miranda*, however, provided a breadth of protection for these rights that previous decisions had lacked, and it actually established a list of specific safeguards[50] to be observed scrupulously by law enforcement agents.

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[45] 401 U.S. 222 (1971).

[46] 417 U.S. 433 (1974).

[47] 430 U.S. 387 (1977).

[48] 384 U.S. 436 (1966).

[49] *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

[50] 384 U.S. at 444-45. The safeguards were spelled out by the *Miranda* Court in this fashion:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some

The Court deemed these safeguards necessary to protect the individual suspect from the inherently intimidating aspects of the custodial interrogation situation.[51] For example, Chief Justice Warren, writing for the Court, placed great emphasis on the claustrophobic nature of custodial interrogation and the sense of isolation that the suspect feels.[52] The Court expressly stated that it was concerned primarily with the evils that can emerge from the interrogation atmosphere and its built-in "badge of intimidation."[53]

Although the Court referred extensively to the traditional in-station direct questioning form of interrogation, it did not ignore subtler police techniques of eliciting information. Indeed, the *Miranda* Court noted several psychological techniques in which police do not question or even directly address the suspect. These include the "reverse line-up," in which a pre-coached witness points out the suspect during a break in questioning.[54] In another technique, the so-called "Mutt and Jeff" act, a kindly and solicitous policeman asks the suspect for cooperation so that he can get an unpleasant and threatening fellow officer removed from the case.[55] These measures are designed to coerce the suspect into making an expedient confession. The Court imposed the same constitutional restrictions on this type of behavior as it did on traditional methods of interrogation, since the impact of the police conduct on the suspect is identical in each case.[56] The *Miranda* Court, then, took a widely-encompassing view of police interrogation in all of its aspects, both obvious and subtle.

Miranda was a landmark decision because the Court had never before demonstrated such concern for the *suspect's* fears and apprehensions. The decision viewed the interrogation environment from the suspect's perspective, and attempted to eliminate those aspects of the environment that may prey upon the suspect's mind and lead him to incriminate himself. It set out to provide the accused wrongdoer with sufficient safeguards against any undue mental pressure caused by the interplay of police custody and police interrogation. At no point in the opinion was *police* perception of the situation a significant consideration. Instead, the Court defined and used the entire concept of interrogation solely in terms of the perceptions and experiences of the suspect.[57]

> questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id.

[51] *Id.* at 478.

[52] *Id.* at 448-50.

[53] *Id.* at 457.

[54] *Id.* at 452-54.

[55] *Id.*

[56] *Id.* The Court indicated that even in the absence of physical brutality or the use of specific psychological ploys, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.*

[57] *See generally id.* at 448-58. The *Miranda* Court stressed the need to develop protections to "dispel the compulsion inherent in custodial surroundings." *Id.*

II. AN UNEASY ALLIANCE: THE BURGER COURT AND *MIRANDA*

The Supreme Court under Chief Justice Burger has demonstrated a distinct lack of enthusiasm for the *Miranda* doctrine.[58] While the Burger Court has not excluded evidence based directly on the authority of *Miranda*,[59] it has interpreted the *Miranda* holding so narrowly that it effectively has eradicated much of the decision's practical application. Although the Court has had several opportunities to deal with *Miranda*, two cases, *Harris v. New York* and *Michigan v. Tucker*, best exemplify the extent to which the Burger Court has removed the teeth from the *Miranda* doctrine. In particular, these cases demonstrate the Court's shift from *Miranda's* emphasis on the suspect's rights in the interrogation setting, to a point of view more concerned with the law's need for incriminating evidence.

A. *Harris v. New York*

The Burger Court first dealt with *Miranda* in *Harris v. New York*.[60] This case presented the question whether statements obtained without proper *Miranda* procedural safeguards could be introduced at trial to impeach the credibility of the defendant's testimony.[61] The defendant, Harris, was arrested for selling heroin to an undercover officer.[62] The arresting officer failed to inform the suspect of his right to appointed counsel before addressing questions to him.[63] In the course of the interrogation, Harris made several incriminating statements.[64] At trial, the prosecution made no effort to introduce these statements as part of its case in chief.[65] Harris, however, took the stand to deny the sales of heroin that had been alleged by police officers in earlier testimony.[66] On cross-examination, the prosecution confronted Harris with

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[58] Warren Burger became Chief Justice on June 23, 1969. Since the beginning of Chief Justice Burger's term Justices Black, Douglas and Harlan have departed, while Justices Powell, Rehnquist and Stevens have joined the Court. Justice Burger's influence certainly has not been determinative in all matters that the Court has considered since the beginning of his term. In this instance, however, Justice Burger's influence, along with that of the other Justices appointed by President Nixon, has had a significant impact on the Court's decision-making. Justices Harlan, Stewart and White had dissented in *Miranda*, and the latter two Justices have, generally, along with the Nixon-appointed Justices, not voted to exclude evidence on the basis of *Miranda*. *See generally* Stone, *The Miranda Doctrine in the Burger Court*, THE SUP. CT. REV. 99-101 (1977).

[59] *Id.* at 100-01. The Burger Court, prior to *Innis*, had handed down the following decisions that concerned the "scope and application" of the *Miranda* doctrine: Harris v. New York, 401 U.S. 222 (1971); Michigan v. Tucker, 417 U.S. 433 (1974); Oregon v. Haas, 420 U.S. 714 (1975); Michigan v. Mosley, 423 U.S. 96 (1975); Baxter v. Palmigiano, 425 U.S. 308 (1976); Beckwith v. United States, 425 U.S. 341 (1976); United States v. Mandujano, 425 U.S. 564 (1976); Doyle v. Ohio, 426 U.S. 610 (1976); Oregon v. Mathiason, 429 U.S. 492 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Washington, 431 U.S. 181 (1977).

[60] 401 U.S. 222 (1971).

[61] *Id.*

[62] *Id.* at 222-23.

[63] *Id.* at 224.

[64] *Id.* at 223. These statements partially contradicted Harris's trial testimony. *Id.*

[65] *Id.* at 223-24.

[66] *Id.* at 223.

statements made by him during interrogation that contradicted parts of his testimony.[67] The trial judge allowed the prosecutor to use these statements, but instructed the jury to consider them in determining the issue of Harris's credibility, and not as evidence of his guilt.[68] Harris was convicted,[69] and the New York Court of Appeals affirmed.[70]

In a 5-4 decision,[71] the United States Supreme Court also affirmed, ruling that the statements in controversy were used in a permissible manner.[72] Chief Justice Burger, writing for the majority, conceded that parts of the *Miranda* opinion could be interpreted as prohibiting the use of such statements for any purpose.[73] Nevertheless, he maintained that such dicta were "not at all necessary to the Court's holding and cannot be regarded as controlling."[74] As a result, he held that *Miranda* did not pose a broad obstacle to the introduction of evidence for impeachment purposes.[75] The Court recognized that *Miranda* protections act as a shield for the suspect by proscribing the use of statements obtained as evidence in derogation of *Miranda*.[76] The Court concluded, however, that this shield is not absolute and that it takes effect only when the prosecution attempts to offer such evidence for the purpose of proving the defendant's guilt.[77] The shield is not available to the defendant as a vehicle for precluding impeachment of his own testimony, the Court reasoned, because *Miranda* was not designed to protect a defendant who perjures himself.[78] In this circumstance, the prosecution can rely on wrongfully obtained evidence to impeach the defendant.[79]

It is difficult to reconcile both the actual language and the spirit of *Miranda* with the conclusions reached in *Harris*. The *Miranda* holding stated that the prosecution "may not use statements, whether exculpatory or inculpatory"[80] obtained without the use of the Court's required procedural safeguards.[81] Unlike *Harris*, the *Miranda* decision did not distinguish the use of such statements for purposes of impeachment from offering them for purposes of proof. Indeed, the *Miranda* Court considered the use of exculpatory statements

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[67] *Id.*

[68] *Id.*

[69] People v. Harris, 31 A.D.2d 828 (1968).

[70] People v. Harris, 25 N.Y.S.2d 175 (1968).

[71] 401 U.S. at 222. Chief Justice Burger's majority opinion was joined by Justices Harlan, Stewart, White and Blackmun. *Id.* Justice Brennan wrote a dissenting opinion, in which Justices Douglas and Marshall joined. *Id.* at 226.

[72] *Id.*

[73] *Id.* at 224.

[74] *Id.*

[75] *Id.* at 226.

[76] *Id.* at 225.

[77] *Id.* at 225-26. The Court believed that, with respect to the deterrent effect of the exclusionary rule, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

[78] *Id.* at 226.

[79] *Id.*

[80] 384 U.S. at 444 (emphasis added).

[81] See note 50 *supra*.

to impeach a defendant's testimony, and ruled explicitly that such statements "may not be used without the full warnings and effective waiver required for any other statement."[82] That Court emphasized that the constitutional issue in *Miranda* was the admissibility of statements obtained in the absence of required safeguards.[83] The *Miranda* Court refused to condition the admissibility of such statements on the purpose for which they were offered.[84] Thus, the *Miranda* Court's primary concern was to keep improperly obtasined evidence out of court entirely.[85] Consequently, when Justice Burger stated in *Harris* that these portions of *Miranda* were not controlling,[86] he effectively announced a clear and decisive turning point in the Supreme Court's approach to fifth amendment self-incrimination cases.

The brevity of the *Harris* opinion[87] is itself significant in light of the importance of the constitutional issues involved. By taking only a few brief paragraphs to reduce the crucial element of *Miranda* which demanded total exclusion of wrongfully-obtained statements from the courtroom to mere dicta,[88] the Court signaled its distaste for the broad protections espoused in the earlier case. The Court obviously did not find it necessary to go to great lengths in order to distinguish *Miranda*. In *Harris*, it demonstrated a diminishing concern for how evidence is obtained by the police, and a greater interest in the trustworthiness of the evidence itself.[89] The *Harris* majority was interested primarily in ensuring that the prosecution would be hampered as little as possible by a suspect's invocation of *Miranda* protections.[90] *Harris*, then, constituted the first major step away from *Miranda's* preoccupation with the rights of the suspect in a custodial interrogation, and toward a heightened regard for the needs of law enforcement officials.

B. *Michigan v. Tucker*

The Burger Court dealt an equally dramatic blow to *Miranda's* vitality in *Michigan v. Tucker*,[91] decided several years after *Harris*. Tucker was arrested for rape and informed by the police of his right to remain silent and of his right to counsel, but not of his right as an indigent to have counsel appointed.[92] An interrogation commenced, and Tucker explained, by way of an alibi, that he had

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[82] 384 U.S. at 477.

[83] *Id.* at 445.

[84] *See generally id.* at 476-79.

[85] *Id.* at 476. The Court made it clear that the privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner; it did not distinguish degrees of incrimination. *Id.*

[86] 401 U.S. at 224.

[87] The majority opinion is barely three pages long.

[88] *Id.* at 224.

[89] *Id.* at 225. The *Harris* Court stressed that "[t]he impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility. . . ." *Id.*

[90] *Id.*

[91] 417 U.S. 433 (1974).

[92] *Id.* at 436.

been with one Henderson at the time of the rape.[93] The police located Henderson, who discredited Tucker's account of his whereabouts.[94] Henderson also provided the authorities with evidence that further incriminated the suspect.[95] Tucker unsuccessfully attempted to exclude Henderson's testimony from his trial, on the grounds that the police had obtained the latter's identity in violation of Tucker's fifth amendment right against self-incrimination.[96] The defendant was found guilty, and his conviction was affirmed by the Michigan Court of Appeals[97] and the Michigan Supreme Court.[98] Tucker sought and received habeas corpus relief in federal district court.[99] That court ruled Henderson's testimony inadmissible, and the Sixth Circuit Court of Appeals affirmed.[100] The Supreme Court, in a 8-1 decision,[101] reversed the Sixth Circuit, ruling the disputed testimony admissible.[102] Justice Rehnquist, writing for the majority, took the opportunity to erode further *Miranda's* constitutional basis.

The *Tucker* Court first characterized the fifth amendment as designed to guard against traditional and brutally compulsive methods of interrogation.[103] It then found that the interrogation of Tucker did not conform to this "Star Chamber" model.[104] Consequently, the Court decided that the police did not violate Tucker's privilege against self-incrimination by failing to inform him of his right to appointed counsel, but instead, merely acted in disregard of a "prophylactic"[105] standard designed to protect that right.[106] The *Tucker* Court failed to acknowledge that *Miranda* was at least as concerned with modern police methods of eliciting information through subtler psychological means[107] as it

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[93] *Id.*

[94] *Id.* at 436-37.

[95] *Id.* Henderson conceded that he had been with Tucker on the night of the crime, but maintained that Tucker had left rather early. He also related to the police details of a conversation between him and Tucker which took place the day following the rape, in which Henderson questioned Tucker about scratches on the latter's face. Tucker intimated that he had received the marks during an encounter with a woman who lived nearby. *Id.*

[96] *Id.* at 437.

[97] People v. Tucker, 19 Mich. App. 320, 172 N.W.2d 712 (1969).

[98] People v. Tucker, 385 Mich. 594, 189 N.W.2d 290 (1971).

[99] Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972).

[100] Tucker v. Johnson, 480 F.2d 927 (6th Cir. 1973) (summary decision).

[101] 417 U.S. at 434. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, Blackmun and Powell joined. *Id.* Justice Stewart and Justice Brennan each filed concurring opinions, as did Justice White. *Id.* at 453, 461. Justice Douglas dissented. *Id.* at 461.

[102] *Id.* at 451.

[103] *Id.* at 439-40. Justice Rehnquist argued that to determine the "scope" of the right against self-incrimination, it was necessary to "hark back to the historical origins of the privilege." *Id.* Needless to say, the notorious religious inquisitions of days gone by had employed rather overtly physical means. *Id.*

[104] *Id.* at 449. The Court emphasized that "[t]he pressures on respondent to accuse himself were hardly comparable even with the least prejudical of those pressures which have been dealt with in our cases." *Id.*

[105] *Id.* at 439.

[106] *Id.* at 444.

[107] 384 U.S. at 448-55. The *Miranda* Court recognized that "the modern practice of in-

was with more obviously abusive techniques.[108] Further, Justice Rehnquist emphasized in *Tucker* that the specific warnings set forth in *Miranda*[109] were not constitutional rights in themselves, but rather, were judicially created devices intended to protect the suspect's fifth amendment privilege against compulsory self-incrimination in a custodial situation.[110]

Again, it is difficult to interpret the *Tucker* decision as consistent with the spirit and intent of *Miranda*. A close reading of the *Miranda* opinion reveals that the procedural safeguards developed by the majority are much more than recommended methods.[111] The holding stated that the procedures must be employed "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it. . . ."[112] Additionally, the *Miranda* Court noted that police are obligated not to take advantage of a suspect's indigence.[113] In contrast, the *Tucker* Court deemed that the right of an indigent to have counsel appointed was relatively unimportant.[114] Further, it did not suggest that the police had developed effective alternative methods of securing this right.[115] The Court's principal concern was not protecting the suspect's constitutional rights, but "making available to the trier of fact all concededly relevant and trustworthy evidence that either party seeks to adduce."[116] Thus, the Court's focus was again drifting away from the suspect and toward the prosecution's need for evidence.

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custody interrogation is psychologically rather than physically oriented." *Id.* at 448.

[108] *Id.* at 445-46.

[109] See note 50 *supra*.

[110] 417 U.S. at 444.

[111] The *Miranda* opinion expressed the need for and desirability of judicial action in providing specific safeguards. Chief Justice Warren, writing for the Court, declared that:

> In any event . . . the issues presented are of constitutional dimensions and must be determined by the courts. . . . Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

384 U.S. at 490-91.

[112] *Id.* at 444.

[113] 384 U.S. at 472. The *Miranda* Court stressed that "[t]he warning of a right to counsel would be hollow if it was not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present." *Id.* at 473.

[114] 417 U.S. at 446-50. Justice Rehnquist stated that before the Court could undertake to penalize police error, it must be established that "the sanction serves a valid and useful purpose." *Id.* at 446. In this case, the majority found that because the police error had occurred prior to the *Miranda* decision, exclusion of the evidence in controversy would have no deterrent effect on future police conduct, as the police were now fully apprised of *Miranda* and its ramifications. *Id.* at 447-48. In addition, Justice Rehnquist stated that the trustworthiness of the evidence had been fully and fairly determined at Tucker's trial. *Id.* at 449. Therefore, the Court concluded that there was no persuasive reason to enforce judicially the particular right ignored by the police, especially in light of the lack of "pressure" on the suspect in this case. *Id.* at 449-50.

[115] The majority opinion in *Tucker* emphasized the relative unimportance of the right itself, rather than potential alternatives to the particular procedural safeguards put forth in *Miranda*. See note 104 *supra*.

[116] 411 U.S. at 450. The *Tucker* Court balanced this interest against that of the suspect

III. INTERROGATION IN A SIXTH AMENDMENT CONTEXT: *BREWER v. WILLIAMS*

Brewer v. Williams[117] provides an intriguing bridge between the Burger Court's series of post-*Miranda* decisions, and *Rhode Island v. Innis*. It dealt with the interrogation problems raised by *Miranda*, and contained a fact situation extremely similar to that of *Innis*. Williams was arrested in Davenport, Iowa for the Christmas Eve kidnapping of a young girl (whom the police suspected had been subsequently murdered) in Des Moines, Iowa.[118] He spoke with attorneys in both cities, who advised him not to make any statements until meeting with his lawyer upon his return to Des Moines.[119] Williams was escorted from Davenport to Des Moines by two police officers.[120] During this trip, Officer Leaming, seated next to the suspect in the back of the vehicle, initiated a conversation with Williams.[121] The officer knew Williams to be a former mental patient and a deeply religious individual and asked him to consider a few matters.[122] Leaming pointed out that a family had had their little girl taken from them on Christmas Eve, that the least they could hope for was to give their daughter a Christian burial, and that the police car would be passing the area where the body was located.[123] Detective Leaming intimated that if they did not stop and locate the body before the predicted snowstorm, the corpse might never be found.[124] The officer then told Williams not to reply to what he had said, but to think it over as they drove along.[125] While still en route to Des Moines, Williams provided the police with incriminating information and ultimately led them to the girl's body.[126]

The trial court[127] and the Iowa Supreme Court[128] both found that Williams validly had waived his right to counsel. Williams was convicted of kidnapping and murder, and the State Supreme Court upheld his conviction

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and found that the societal interest in this case was the considerably stronger of the two. *Id.* at 450-51.

[117] 430 U.S. 387 (1977). Interesting and enlightening articles concerning *Brewer* and pertinent interrogation questions include Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1 (1978); Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977); and Graham, *What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59 (1966).

[118] 430 U.S. at 390.

[119] *Id.* at 390-91.

[120] *Id.* at 391. Officer Leaming and a fellow officer had traveled from Des Moines to Davenport to pick up Williams. *Id.*

[121] *Id.* at 392.

[122] *Id.*

[123] *Id.* at 392-93.

[124] *Id.* at 393.

[125] *Id.*

[126] *Id.*

[127] The decision of the trial court is unreported. *Id.* at 394 n.2. The trial judge found that the evidence had been obtained from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request," but that the defendant had "waived his right to have an attorney present during the giving of such information." *Id.* at 394.

[128] State v. Williams, 182 N.W.2d 396 (Iowa 1972).

on appeal.[129] Williams petitioned for habeas corpus in federal district court,[130] which ruled that he had been denied his previously asserted right to counsel during his automobile trip, and that he had not waived this right.[131] *Brewer* was argued on *both* fifth and sixth amendment grounds at every level, and all of the lower tribunals took *Miranda* into account to some degree in deciding the case.

The United States Supreme Court, in a 5-4 decision,[132] affirmed the judgment of the federal district court.[133] Justice Stewart, writing for the majority, found that an interrogation occurred because Detective Leaming "deliberately and designedly set out to elicit information"[134] from Williams in giving the "Christian burial speech."[135]

This decision, however, did not herald any renewed enthusiasm for *Miranda* in the Burger Court, because it was based solely on sixth and fourteenth amendment grounds.[136] In light of the custodial interrogation in *Brewer*, it is very odd that the Court did not dispose of the case based on *Miranda* or even mention *Miranda* in the course of its opinion.[137] The omission of *Miranda* is even more striking in light of *Brewer's* procedural history.

That the Court was inconsistent in dealing with interrogation cases is demonstrated further by its treatment of *Rhode Island v. Innis*. Although *Innis* presented an interrogation situation similar to *Brewer*, the Court nevertheless based its decision on the fifth amendment rather than the sixth amendment.[138] The pattern which emerges is that of a Court extremely reluctant to exclude evidence of great probative value on the authority of *Miranda*. Despite the parallels in the fact situations of the two cases,[139] the Court developed two conceptually distinct doctrines for disposing of interrogation cases: one rooted in

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[129] *Id.*

[130] Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974).

[131] *Id.* at 178-79.

[132] 430 U.S. at 388. Justice Stewart's opinion was joined by Justices Brennan, Marshall, Powell and Stevens. *Id.* Justices Marshall, Powell and Stevens each filed concurring opinions. *Id.* at 406, 409, 414. Chief Justice Burger dissented. *Id.* at 415. Justice White also dissented in an opinion joined by Justices Blackmun and Rehnquist. *Id.* at 429. Justice Blackmun filed a separate dissenting opinion, which was joined by Justices White and Rehnquist. *Id.* at 438.

[133] *Id.* at 406.

[134] *Id.* at 399.

[135] *Id.* at 392. The briefs and oral arguments of the parties used this term to refer to Detective Leaming's discourse to Williams. *Id.*

[136] *Id.* at 397-98.

[137] *Id.* at 397. Justice Stewart referred to *Miranda* only once in the course of his opinion, and only for the purpose of stating that "there is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against self-incrimination. . . ." *Id.*

[138] 446 U.S. at 293. In sharp contrast with *Brewer*, where he had found no need to consider *Miranda* at all, 430 U.S. at 398-99, in his *Innis* opinion Justice Stewart dealt only with fifth amendment, *Miranda* considerations. Justice Stewart insisted that the sole issue in *Innis* was whether the suspect was "interrogated" in violation of *Miranda* standards. 446 U.S. at 293.

[139] *See* 430 U.S. at 392-93, 446 U.S. at 294-95. In both cases policemen were escorting custodial suspects to the station in official police vehicles, in both instances the police made remarks which touched the suspect's conscience or concern for others, and as a result the respective suspects provided the police with significant incriminating information. *Id.*

the sixth amendment, the other in the fifth amendment. This division provides the Court with a means of avoiding the exclusion of evidence based on *Miranda*.

The *Brewer* Court, then, deliberately chose not to exclude evidence on the authority of *Miranda*, even in a case where the opportunity to do so clearly presented itself. As a result, the trend evidenced in *Harris* and *Tucker* was allowed to continue unabated, and *Miranda's* efficacy in safeguarding the fifth amendment rights of the suspect remained in decline. *Rhode Island v. Innis*, then, provided a significant opportunity for the Court to further eviscerate *Miranda*. This case, centering as it did on the implication of police behavior in the presence of a suspect held in custody, enabled the Court to present its own interpretation of the custodial situation. This interpretation proved to be significantly different from that of the *Miranda* Court.

IV. *RHODE ISLAND v. INNIS*: A CLOSER LOOK

Through examining *Rhode Island v. Innis* in some detail, it is possible to demonstrate the precise nature of the case's holding, and the potential effect this holding may have. By the time *Innis* came before the Court, *Miranda* had been undercut in a number of ways.[140] The Court has held that statements obtained without proper *Miranda* warnings were admissible for impeachment purposes,[141] and that *Miranda* warnings were not rights in themselves, but were instead merely prophylactic devices.[142] The Court then seized the opportunity in *Innis* to continue its gradual rejection of *Miranda's* suspect-oriented approach in favor of a police-oriented view. The Court had options available in deciding how to dispose of this case. The majority could have reversed the Rhode Island Supreme Court primarily on sixth amendment grounds. The Court, nevertheless, chose to decide the case solely on the basis of its fifth amendment conclusion that no interrogation had taken place.[143] The Court focused on *Miranda* in this case, where crucial evidence was admitted, in sharp contrast to *Brewer*, where evidence was excluded without mention of *Miranda*. Thus, Justice Stewart's *Innis* opinion demonstrated the state of disrepute into which *Miranda* has fallen in the current Court.

The *Innis* Court held that *Miranda* "interrogation" included not only express questioning, but also all police words or actions that "the police should know are reasonably likely to elicit an incriminating response from the suspect."[144] The holding excluded from this definition words or actions "normally attendant to arrest and custody,"[145] but did not specify or give examples of such behavior.[146] In deference to *Miranda* the *Innis* opinion purports to focus

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[140] See text at notes 60-116 *supra*.

[141] Harris v. New York, 401 U.S. 222 (1971).

[142] Michigan v. Tucker, 417 U.S. 433 (1974).

[143] 446 U.S. at 303-04.

[144] *Id.* at 301.

[145] *Id.*

[146] *Id.* It is doubtful that the Court would include the police behavior in *Innis* under this particular exception, as the Court found that the remarks were not part of a routine, but instead were spontaneous expressions of concern. *Id.* at 303.

part of its definition on the suspect's perceptions.[147] The Court's standard indicates, however, that an interrogation takes place only when the police themselves perceive that the likely result of their words or actions will be an incriminating response from the suspect.[148] Thus, the critical elements in the standard are police evaluation of the susceptibility of suspects in general, and police knowledge of the peculiar susceptibilities of specific individual suspects.[149]

In *Innis*, as in *Brewer*, the Court was asked to examine the content of police statements to determine whether an interrogation was conducted in violation of the suspect's constitutional rights.[150] Even assuming that in *Brewer* Williams was "interrogated" within the meaning of *Innis*, however, it is impossible to match neatly the facts of *Brewer* and *Innis* and conclude with certainty that Innis was so interrogated. Most significantly, the "interrogating" officer in *Brewer* knew of the suspect's particular beliefs and idiosyncracies, and made use of this knowledge in speaking to the suspect.[151] Further, the officer directly addressed his remarks to the suspect[152] and was a veteran of the police force, with years of experience in interrogation techniques.[153] Finally, the officer acknowledged that his primary purpose in "conversing" with Williams was to elicit information.[154] None of these elements of the *Brewer* "interrogation" were present in the *Innis* situation.[155] Nevertheless, the Court found that it had to emphasize other factors in reaching its decision.

In finding *Brewer* inapplicable to the case before it, the *Innis* Court noted that the Providence officers knew of no particular interest on Innis's part in handicapped children,[156] whereas Detective Leaming in *Brewer* had possessed knowledge of the suspect's unique religious interests. The Court considered this to be a significant distinction between *Brewer* and *Innis* in determining whether police conduct was likely to elicit an incriminating response.[157] Inbau and Reid, the authors of widely-read police interrogation manuals and articles[158] on the subject, however, recommend appeals to the suspect's conscience and sense of morality for effective interrogation. Thus, the police in *Innis* may have had more reason to expect a response from the suspect than the

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[147] *Id.* at 301.

[148] *Id.*

[149] *Id.* at 302-03.

[150] *Id.* at 293. See text at notes 134-38 *supra.*

[151] 430 U.S. at 392-93.

[152] *Id.* at 392-93.

[153] *See* Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 211, 215-33 (1977).

[154] 430 U.S. at 399.

[155] 446 U.S. at 294-95.

[156] *Id.* at 302.

[157] *Id.* at 302-03. The Court stressed that the *Innis* conversation apparently consisted of no more than a few off-hand remarks, and that "[t]his is not a case in which the police carried on a lengthy harangue in the presence of the suspect." *Id.*

[158] *See, e.g.*, F. INBAU AND J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967); INBAU AND REID, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953).

Court might have imagined. An appeal to save the lives of unfortunate young people has an almost universal impact on human consciences. The image of a small handicapped girl destroying herself with a shotgun imparts an obvious emotional effect that would vitiate the need for police knowledge of specific sensitivity of a suspect to such remarks.

Another possible distinction between *Brewer* and *Innis* is that the *Innis* officers never directly addressed the respondent in the course of their custodial ride together.[159] Making the direct approach a prerequisite to a finding of interrogation would lead to a concerted shift by police to subtler, but no less effective, means of eliciting information from suspects.[160] The *Miranda* Court noted the availability of several alternative methods of interrogation, including changes in vocal inflection and nonverbal communication.[161] Consequently, by failing to address Innis personally, the officers did not preclude a finding of "interrogation."

These results, therefore, necessitate a consideration of the actual intent and purpose behind the conversation of the Providence policemen regarding weapons and retarded children. Intent was an important concept in both *Brewer* and *Innis*.[162] Unlike Officer Leaming in *Brewer*, the *Innis* officers did not acknowledge any intent to extract information from the suspect.[163] While the trial court made no finding as to whether their remarks were made to elicit a response from Innis,[164] the Rhode Island Supreme Court suggested the presence of intent in the officers' conversation.[165] Nevertheless, the United States Supreme Court accepted the proposition that the policemen merely were expressing their natural concern for the safety of nearby children.[166]

While there is some support for a finding that the officers were putting innocently into words their pent-up worries and anxieties about the potential fate of the young students, on balance it seems likely that the police intended their conversation to elicit a response from the suspect. In support of the Court's finding, it must be noted that the policemen never verbally confronted the suspect with the problem, but instead kept it between themselves, although they obviously were aware that Innis could overhear their conversation. Furthermore, that the officers were told by their superior, Captain Leyden, "not to question the respondent or intimidate or coerce him in any way,"[167] lends credence to the Court's finding. In addition, Officers Gleckman and McKenna

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[159] 446 U.S. at 302.

[160] Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172, 175.

[161] 384 U.S. at 445-58.

[162] 446 U.S. at 301 n.7. The *Innis* Court took great care to demonstrate that the only intent behind the officers' conversation was to share their fears for the children. *Id.* at 302-03.

[163] *Id.*

[164] Brief for Appellant at 25.

[165] Rhode Island v. Innis, 446 U.S. 296. The court observed that "[t]he police officers in the wagon chose not to discuss sports or the weather but the crime for which the defendant was arrested." __ R.I. at __, 391 A.2d at 1162.

[166] 446 U.S. at 302-03.

[167] *Id.* at 294.

were young and relatively inexperienced,[168] in comparison with the years of on-the-job training of Officer Leaming in *Brewer*.[169]

Nevertheless, strong arguments can be made against the Court's conclusion. First, classic interrogation techniques, such as appeals to the conscience, are described in police interrogation manuals and are taught in basic police training.[170] The fact that an inexperienced policeman would know of and be able to employ such techniques, therefore, should not be dismissed easily in evaluating the underlying motive for the remarks made to a suspect such as Innis. Second, there are several aspects of *Innis* which suggest that the officers did intend to elicit information. These include the officers' initiation of their conversation at the very commencement of the drive,[171] knowing that the trip to the central police station was a very brief one.[172] This may indicate that the officers wished to make certain that Innis was made privy to their talk. Also, although the Court concluded that the language used by the policemen was not particularly evocative,[173] it is rather difficult to imagine very much more evocative material than that contained in the words and vivid imagery of Officer Gleckman's remarks.

Although intent to elicit information is not the determinative factor in the *Innis* Court's definition of interrogation,[174] a finding of such a purpose in this case probably would have changed its result. While Justice Marshall's dissent interpreted the Court's standard to embrace all deliberate attempts under the penumbra of interrogation,[175] the majority did not go this far.[176] It is thus possible that a deliberate attempt to elicit information would be excluded from the Court's definition if the policemen involved concluded that their attempt was "not reasonably likely" to obtain an incriminating response from the suspect.[177] A finding of intent, however, would certainly provide strong evidence that the subjective elements necessary to constitute a *Miranda* interrogation were indeed present.[178] The intent to obtain incriminating evidence need not be the sole or even the primary purpose behind the officers' words or

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[168] Brief for Appellant at 24.

[169] *Id.* at 23.

[170] 446 U.S. at 314-15. Justice Stevens stated that "the practical experience embodied in such manuals should not be ignored in a case such as this in which the record is devoid of any evidence — one way or the other — as to the susceptibility of suspects in general or of Innis in particular." *Id.* at 315.

[171] See note 11 *supra*.

[172] *Id.*

[173] 446 U.S. at 303.

[174] *Id.* at 301.

[175] *Id.* at 305. Justice Marshall stated that the *Miranda* protections "apply whenever police conduct is *intended* or likely to produce a response from a suspect in custody." *Id.* (emphasis added).

[176] *Id.* at 301-02. Justice Stewart only indicated that when a police practice is intended to elicit incriminating information from the suspect, it is unlikely that this practice will not fall under the Court's definition of interrogation. *Id.* at 301 n.7.

[177] *Id.* at 301-02.

[178] *Id.* at 301 n.7.

actions.[179] For example, even if the Providence policemen's *foremost* concern in attempting to gain information was to save children's lives, their remarks could still constitute a *Miranda* interrogation so long as their remarks were likely to elicit incriminating statements.[180]

An examination of *Innis* shows, then, that the presence of certain traditional elements of an interrogation will not in all cases trigger the application of *Miranda* protections. The facts of the case could conceivably have provided a basis for the Court to affirm the Rhode Island Supreme Court's decision either on *Brewer* or *Miranda* grounds. Nevertheless, the Court chose to distinguish *Brewer*, and to define narrowly the situations in which *Miranda* safeguards would be available to a given suspect.

V. THE *INNIS* STANDARD — *MIRANDA* IN DECLINE

The definition of *Miranda* interrogation set forth in *Innis* portends a continuation of the Burger Court's less than amicable approach to the *Miranda* decision. The signals here are somewhat more subtle than in cases such as *Harris* and *Tucker*, as the issues presented for consideration in *Innis* require no open "adjustment" of *Miranda's* language or constitutional underpinnings. The thrust of *Innis*, however, is directly in line with most of the Court's other recent decisions.[181] Although the *Innis* Court very briefly touched on the importance of the perceptions of the suspect,[182] the key element that actually determined whether an interrogation had occurred was the *policeman's* evaluation of a given suspect's perceptions and susceptibilities.[183] Thus, as in *Harris* and *Tucker*, the Burger Court was again approaching the difficulties inherent in a custodial situation from a limited, police-oriented viewpoint as opposed to *Miranda's* suspect-oriented perspective. Finally, the majority's application of its standard to the specific circumstances of *Innis* indicated that the Court will continue to interpret fact situations in *Miranda*-related cases in a light most favorable to the law enforcement officers involved.[184] It is apparent that under the Court's current line of reasoning an accused criminal will face much difficulty in attempting to exclude important evidence on grounds of police deception or psychological coercion.

The application of the *Innis* standard itself presents potentially large and complex problems for lower courts in future litigation. For example, the *Innis* decision provides no objective guidelines to determine whether, in a given case,

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[179] *Id.* at 301-02.

[180] *Id.*

[181] See note 59 and text at notes 60-116 *supra*.

[182] 446 U.S. at 301.

[183] *Id.* at 302.

[184] *Id.* at 302-03. The *Innis* Court not only gave police the benefit of the doubt as to their motives in initiating the conversation, but also found that the language they used was not evocative. This suggests at the least that in cases of this type, any potential ambiguity in the facts will be resolved in favor of the law enforcement officers. *Id.*

the police should have known their behavior was reasonably likely to evoke incriminating statements.[185] Additionally, the Court expressly noted that police knowledge of a particular susceptibility of a defendant may be an important factor[186] in ascertaining whether the standard is met. This suggests that the Court intended its definition of a *Miranda* "interrogation" to be applied on a case-by-case basis, with the particular eccentricities of each suspect and the knowledge of each policeman involved to be determined and evaluated.

As Chief Justice Burger stressed in his concurring opinion,[187] this approach may very well "introduce new elements of uncertainty"[188] into the evaluation of this type of case. Under the *Innis* decision, an officer must make a kind of "snap judgment" in evaluating a suspect's mental state and possible susceptibilities. This, of course, poses difficulties for police officers without any professional training in psychology or psychiatry. Such evaluations are more appropriately left to mental health professionals. It is suggested that police would require more concrete guidelines in order to perform their jobs fairly and efficiently. *Innis* also presents courts with the labyrinthine task of determining an officer's immediate evaluation of a suspect's mental state at the time of his or her arrest, an unenviable task at best.

Although it is impossible to predict how lower courts will apply this definition of interrogation, the *Innis* Court's rationale suggested that it will apply a very narrow interpretation of what constitutes interrogation. In deciding that Innis was not interrogated, the Court signaled that its standard affords police considerable leeway in individual cases.[189] As a result, only blatant police attempts to exploit a suspect's peculiar weaknesses and susceptibilities will convince the Court to find interrogation. Absent such unlikely and egregious circumstances, it is probable that the current Court will, as Justice Stevens suggested in his dissent,[190] "almost certainly exclude every police statement that is not punctuated with a question mark from the concept of 'interrogation.' "[191]

In addition to pointing out this fundamental flaw in the majority's opinion, Justice Stevens articulated a standard of interrogation that was much more faithful to the spirit of *Miranda* because it emphasized the suspect's perception of the situation.[192] By incorporating the viewpoint of the reasonable suspect,[193] this definition would significantly discourage the police from infringing on the rights of the accused. At the same time, however, it would not force the police to be totally silent in the suspect's presence.[194]

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[185] *Id.* at 302.

[186] *Id.* n.8.

[187] *Id.* at 304.

[188] *Id.*

[189] See note 184 *supra.*

[190] 446 U.S. at 307.

[191] *Id.* at 312.

[192] *Id.* at 311. Justice Stevens perceptively pointed out that "[f]rom the suspect's point of view the effectiveness of the warnings depends on whether it *appears* that the police are scrupulously honoring his rights." *Id.* (emphasis added).

[193] *Id.*

[194] *Id.* The police could conceivably discuss a wide range of subjects without saying or

While Justice Stevens's objective reasonable suspect standard is appealing in theory, it nevertheless may be difficult to apply. Many criminal suspects, whether in cases of violent crime or other situations, may not conform to the description of the reasonable man. Justice Stevens's definition left unanswered the question whether police may behave toward an unstable suspect in a manner that would not elicit a response from a "reasonable suspect in the suspect's position,"[195] but probably elicit an incriminating response from this particular individual. A given suspect may possess strong personal interests in a particular subject, as did the accused in *Brewer v. Williams*, or may have peculiar mental weaknesses or lapses.[196] Clever police officers could exploit these idiosyncracies, while still avoiding any actions to which a reasonable suspect would have been expected to respond. A literal application of Justice Stevens's definition could thus conceivably leave the door open to, and perhaps encourage, this type of police practice.

VI. AN ALTERNATIVE INTERROGATION STANDARD

Both the majority standard of Justice Stewart and that proposed by Justice Stevens in his dissent present serious potential difficulties. The majority definition of interrogation is not only at odds with the spirit of *Miranda*, but it is also extremely difficult to apply in practice. Justice Stevens's definition is more philosophically reconcilable with the *Miranda* opinion, but presents its own problems due to its "reasonable suspect" classification. Thus an alternative standard is necessary. It would seem that a standard, incorporating Justice Stevens's basic concept with a slight alteration, would provide the most fair and practical definition of fifth amendment interrogation.

The most acceptable concept of a *Miranda* "interrogation" would include any police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response, and any or all police conduct or statements intended to elicit an incriminating response from the suspect, regardless of whether or not a reasonable suspect would respond to such conduct or statements. This definition conforms with the basic *Miranda* principles, as it places primacy on the custodial suspect's point of view, as opposed to the perceptions of the police guarding that suspect. In addition, it precludes the police from taking advantage of a suspect's unreasonable characteristics or vulnerabilities. The standard would be relatively simple to implement, as courts would have to make a subjective determination only in cases where police conduct would not appear to a reasonable person in the suspect's position to call for a response. Therefore, the standard would be both practical for the courts to apply and would provide the degree of protection for the suspect that *Miranda* dictated.

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doing anything that would have "the same purpose or effect as a direct question" to the suspect. *Id.* at 311.

[195] *Id.*

[196] 430 U.S. at 392. A reasonable person might not have responded to the *Brewer* "Christian burial" speech with incriminating information. Nevertheless, an unstable individual

Given the standard adopted by the Court in *Innis*, however, a defense attorney faced with a parallel situation in the future has limited options available in attempting to suppress damaging evidence. He may attempt to suppress the evidence by insisting that the suspect *believed* that he was being interrogated, and for that reason volunteered incriminating information. This approach, however, is most likely futile in light of the *Innis* Court's emphasis on the police viewpoint. Thus, the attorney's strongest potential argument under *Innis* is to stress that the police should know that the ordinary suspect is emotionally moved by the plight of particularly vulnerable individuals, such as children and handicapped people. Only if the defense clearly demonstrated that the police had exploited a suspect's normal sensitivities, would an interrogation be invalidated on fifth amendment grounds. Thus, the Court has almost completely eliminated any practical effect that *Miranda* once had in excluding evidence of questionable interrogations from the courtroom.

CONCLUSION

In *Rhode Island v. Innis*, the Supreme Court defined fifth amendment interrogation in a subjective, police-oriented manner. This decision marked a continuation of the Burger Court's desire to limit *Miranda* to the greatest degree possible. The controversial *Miranda* decision, once believed to provide definitive guidelines in determining the nature of future police interrogations, has been drained of most of its import by the current Court. *Innis* places the criminal suspect in an extremely precarious position in the custodial situation, as the Court places a premium on police evaluation of the accused's mental condition at the time of arrest. Although the Court attempted in *Innis* to enhance the position of law enforcement officials, its decision creates difficulties for police, in having to make on the spot assessments of the suspect's sensitivities. Moreover, a burden is placed on the courts in having to determine what the police should have known at the time of the interrogation. The resolution of these problems can only come from future litigation involving the application of the *Innis* definition of interrogation. The Court itself, however, may not view these problems as significant. Rather, such difficulties may be mitigated by the current Court's indication that the definition of interrogation will be applied in specifically defined situations. Thus, it appears that the effect of *Innis* is to characterize only direct questions and overt attempts to procure information as interrogation.

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with unusually strong religious feelings did so respond. *Id.* It is, therefore, possible that a literal reading of Justice Stevens's standard would not include Detective Leaming's remarks in that case. *Id.*